

PLXpress, a wholly owned subsidiary of Payless Drug Stores NW, Inc. and Chauffeurs, Teamsters and Helpers Union Local 150, International Brotherhood of Teamsters, AFL-CIO and Jay McDonald. Cases 20-CA-24274 and 20-CA-24380

May 16, 1994

DECISION AND ORDER

BY MEMBERS STEPHENS, DEVANEY, AND COHEN

On July 14, 1993, Administrative Law Judge James M. Kennedy issued the attached decision. The Respondent and the General Counsel filed exceptions and supporting briefs, and the General Counsel filed an answering brief in support of portions of the decision of the judge.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order except as set forth below.

The General Counsel excepts to the judge's denial of his motion to amend the complaint in Case 20-CA-24274¹ and further requests the Board to find on the merits that the Respondent violated the Act as alleged in the motion to amend. We find merit to this exception; we will, however, remand this allegation to the judge for further consideration and issuance of a supplemental decision.

The following facts are not in dispute. On September 23, 1991,² employee Jay McDonald forwarded to all the drivers at the Respondent's Woodland facility a union authorization card and a letter urging the drivers to sign and mail the card. In the letter, McDonald accused the Respondent of making "hollow promises" of wage parity between Woodland and Wilsonville drivers.³ On October 1, the Respondent suspended

McDonald for 1 week because he had circulated the September 23 letter. In the complaint in Case 20-CA-24274, the General Counsel alleged that this suspension violated Section 8(a)(3) and (1) of the Act. The complaint was based on the October 7 charge filed by Teamsters Local 150 that the Respondent had suspended McDonald "due to his union organizing activities."

On January 6, 1993, during the hearing in this case, the General Counsel put into the record a September 26 letter from the Respondent's attorney, Bob Tiernan, to the Respondent's president, Shannon McCord.⁴ This letter advised McCord not to go ahead "next month" with a planned 40 cents' parity increase for Woodland drivers because, Tiernan stated, drivers would view it as a reaction to McDonald's September 23 letter. The September 26 letter also advised McCord that recommendations on discipline for McDonald's September 23 letter would be forthcoming.⁵ The General Counsel also questioned the Respondent's sole witness at the hearing, Woodland's trucking supervisor, Bob Swor, about the parity increase between Woodland and Wilsonville drivers. Swor testified that the Respondent's managers had discussed the option of giving the Woodland drivers a parity increase but that it was, in fact, not granted the Woodland drivers.⁶

Based on the Respondent's September 26 letter and Swor's testimony, the General Counsel moved to

promises and selective enforcement of company and D.O.T. regulations.

Cliff Webb (newly elected secretary-treasurer of Local #150) told me, during a meeting I had with him, the Teamsters would take a greater stand to help PLXpress drivers organize. He felt a major mistake was made during the last organization attempt. Please fill out the enclosed card and drop it in the mail today.

⁴ This letter was part of McDonald's personnel file which was obtained at the hearing by the General Counsel pursuant to subpoena. The judge overruled the Respondent's objection, based on a confidentiality claim, to the introduction of this letter. The Respondent has not excepted.

⁵ The letter stated in its entirety:

At your request I reviewed the letter sent by J.E. McDonald to all the other drivers.

There are some clear misrepresentations and unfounded allegations in the letter. I will call you tomorrow regarding my recommendations/discipline on this matter.

Also, Mr. McDonald, did make statements regarding the parity issue on which we have been working. Although we had planned a 40 cents increase next month, I *do not* advise PLXpress now to give it.

If PLXpress was to go ahead with the mid-year increase in order to reach parity with the Wilsonville drivers, it would be seen by most drivers as a *reaction* to Mr. McDonald's letter. Letting an employee or employees think they can intimidate you in order to obtain a greater benefit, would be a terrible mistake.

You can always give the 40 cents in February with the rest of Pay Less wage reviews.

It is unfortunate Mr. McDonald circulated this letter with this issue in it. However, I see no other alternative. [Emphasis in original.]

⁶ The judge overruled the Respondent's relevancy objection to the introduction of this testimony. The Respondent has not excepted.

¹ JD fn. 2. The judge inadvertently referred to Case 20-CA-24380 rather than the correct Case 20-CA-24274.

² All dates are in 1991 unless otherwise indicated.

³ The letter stated in its entirety:

In January of this year, you voted in a National Labor Relations Board sanctioned election which would have authorized Teamsters Local #150 to represent the drivers of PLXpress.

A majority of the drivers fell victim to the same old line management has given the California drivers for over four years. "We're going to bring you up to parity with Wilsonville drivers" is the redundant statement management always has on their lips.

I hope every one is fully aware we were taken for suckers. The only thing we got was a 3.704% raise for hourly work, a 2.941% raise for mileage runs, and a seven day work week.

It is time to make a statement and take a united stand. We need to let management know we have had enough of their empty

amend the complaint in Case 20-CA-24274 to include the allegation that “on or about September 26, 1991, Respondent withheld a scheduled pay increase for its employees because its employees engaged in union and/or protected concerted activities” in violation of Section 8(a)(3) and (1) of the Act. The Respondent opposed the motion on the basis that it was precluded by Section 10(b). The judge denied the motion on the basis that the allegation was not reasonably encompassed in the charges filed in the case.⁷

In his exceptions, the General Counsel contends that the wage withholding allegation arises from the same factual circumstances as the suspension allegation and both rely on the same legal theory. The General Counsel thus argues that his proposed amendment to the complaint in Case 20-CA-24274 is closely related to the timely filed charge in that case, and that the judge erred in not permitting amendment of the complaint. We agree.

To be successful in amending the complaint in this case the General Counsel must demonstrate that the charge that McDonald was suspended in violation of Section 8(a)(3) is closely related to the allegation that the wage increase was unlawfully withheld. *Nickles Bakery of Indiana*, 296 NLRB 927 (1989). In determining whether there is a sufficient nexus between the allegations in the charge and the complaint allegations, the Board examines, among other things, whether the two arise from the same factual circumstances and are based on the same legal theory. *Southwest Distributing Co.*, 301 NLRB 954, 955-956 (1991); *Well-Bred Loaf*, 303 NLRB 1016 fn. 1 (1991).

Here, we find that the suspension allegation and the wage withholding allegation arise from the same factual circumstances. Thus, the judge found, and we agree, that, as alleged in the charge and complaint, McDonald was suspended in violation of Section 8(a)(3) because he circulated his September 23 letter to the Woodland drivers. One of the issues McDonald raised in his September 23 letter was the Respondent’s failure to keep its promises about giving the Woodland drivers wage parity with Wilsonville drivers. The Respondent counsel’s September 26 letter, which addressed directly McDonald’s September 23 letter, noted that recommendations about McDonald’s discipline for circulating the September 23 letter would be forthcoming, and advised that the planned wage parity increase for Woodland drivers should be canceled because of McDonald’s September 23 letter. Thereafter, the Respondent both suspended McDonald and decided not to give the wage parity increase to the Woodland drivers. The factual nexus between the suspension allegation and the wage withholding allegation is clear—

both allegations arose from McDonald’s September 23 letter. The Respondent attorney’s September 26 letter dealt with both allegations and the Respondent’s conduct conformed to the blueprint established in that letter.

In concluding that the wage withholding allegation is closely related to the suspension allegation, we also rely on the fact that both the suspension allegation and the wage withholding allegation involve the same legal theory—that Respondent discriminated against McDonald and the other drivers in violation of Section 8(a)(3) and (1) of the Act in retaliation for McDonald’s circulating the letter. McDonald’s September 23 letter was standard union organizing fare. For circulating it to the Woodland drivers, the Respondent suspended McDonald in violation of Section 8(a)(3). As alleged by the General Counsel, the Respondent additionally canceled its planned wage increase for the Woodland drivers because of the letter’s circulation, also in violation of Section 8(a)(3). Thus, both allegations allege that the Respondent engaged in acts of discriminatory conduct in response to McDonald’s letter.

Accordingly, we find that the discriminatory wage withholding allegation is closely related to the suspension charge in Case 20-CA-24274, and, therefore, that the General Counsel should be permitted to amend the complaint.⁸ To ensure that the wage withholding allegation is fully litigated, however, we remand this issue to the judge for a further hearing and the preparation of a supplemental decision containing specific findings of fact and credibility resolutions regarding the Respondent’s alleged withholding of a scheduled pay increase in violation of Section 8(a)(3) and (1) of the Act.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, PLXpress, a wholly owned subsidiary of Payless Drug Stores NW, Inc., Woodland, California, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

IT IS FURTHER ORDERED that this proceeding is remanded to Administrative Law Judge James M. Kennedy for the limited purpose of reopening the hearing to allow the judge to make specific findings of fact and credibility resolutions concerning the allegation that the Respondent, on or about September 26, 1991, withheld a scheduled pay increase for its employees in violation of Section 8(a)(3) and (1) of the Act.

IT IS FURTHER ORDERED that the judge shall prepare and serve on the parties a supplemental decision setting forth the resolution of such credibility issues, find-

⁷The charge in Case 20-CA-24380 alleged that the Respondent discharged McDonald because of his union organizing activities in violation of Sec. 8(a)(3) and (1) of the Act.

⁸*Drug Plastic & Glass Co.*, 309 NLRB 1306 fn. 1 (1992); *Southwest Distributing Co.*, supra; *Van Dyne Crotty Co.*, 297 NLRB 899, 900 (1990).

ings of fact, conclusions of law, and recommendations, including a recommended Order. Copies of the supplemental decision shall be served on all the parties after which the provisions of Section 102.46 of the Board's Rules and Regulations shall be applicable.

Boren Chertkov, for the General Counsel.

Bob Tiernan (Tiernan and Orheim), of Lake Oswego, Oregon, for the Respondent.

Jay McDonald, of Sacramento, California, pro se.

DECISION

STATEMENT OF THE CASE

JAMES M. KENNEDY, Administrative Law Judge. This case was tried before me in Sacramento, California, on December 17, 1992, and January 6 and 7, 1993, on two complaints issued by the Regional Director for Region 20 of the National Labor Relations Board and which were consolidated for hearing on January 28, 1992. The complaints are based on separate charges filed by Chauffeurs, Teamsters and Helpers Union Local 150, International Brotherhood of Teamsters, AFL-CIO (the Union) on October 7, 1991,¹ and by Jay McDonald, an individual (McDonald), on December 11, 1991. They allege that PLXpress, a wholly owned subsidiary of Payless Drug Stores NW, Inc. (Respondent) has committed certain violations of Section 8(a)(3) and (1) of the National Labor Relations Act.

Issues

There are two issues to be decided. First, whether Respondent could lawfully suspend for a week its employee McDonald on October 2 because he wrote a letter to fellow employees soliciting them to join the Union and in which he made certain allegations regarding Respondent's treatment of employees. Second, whether Respondent discharged McDonald on December 9 because he engaged in organizing activities on behalf of the Union.

Respondent defends the suspension on the ground that McDonald's letter inappropriately disparaged management and resists the discharge on the ground that McDonald, a truckdriver, had been involved in an accident on December 4. It asserts that it was McDonald's second similar accident. As such, it concluded that McDonald had a history of carelessness sufficient to warrant his discharge. It therefore asserts that its decision to discharge McDonald was not discriminatory. The General Counsel rejoins, arguing that Respondent did not treat McDonald in the same fashion it did other drivers who suffered accidents and, moreover, it had no valid accident policy in effect and therefore did not apply any neutral policy to McDonald.

The parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, to argue orally, and to file briefs. Both the General Counsel and Respondent have filed briefs which have been carefully considered.² Based on the entire record of the

case, as well as my observation of the witnesses and their demeanor, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent admits that it is an Oregon corporation having a place of business in Woodland, California, and that it is engaged in the business of hauling merchandise for its parent corporation, Payless Drug Stores NW, Inc. It further admits that during the calendar year ending December 31, 1990, it derived gross revenues in excess of \$50,000 from the transportation of freight and commodities from the State of California directly to points outside California. Accordingly, it admits that at all times material it has been engaged in commerce and in an industry affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

The Union's status as a labor organization within the meaning of Section 2(5) of the Act is not in dispute.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. Background

Respondent's parent, Payless Drug Stores NW, Inc., is a large retail drugstore chain which operates in 12 western States. It is headquartered in Wilsonville, Oregon, and has at least two distribution centers, one in Wilsonville and the other in Woodland, California. Woodland is a small town located approximately 15 miles west of Sacramento. The distribution center located there services a wide area of California and perhaps other States as well. Prior to 1988, the actual transportation of merchandise was carried out by two transportation firms, first Leaseaway and later, Electrans. In 1988 Payless established Respondent PLXpress, releasing the most recent hauling firm, Electrans, and hiring most of Electrans's drivers and some of its managerial staff. One of the drivers it retained from that predecessor was Jay McDonald, the Charging Party. For the most part, McDonald has served as an over-the-road driver, operating a tractor-trailer rig from the Woodland distribution center. On occasion, he has been assigned to be a hostler in the yard.

The Woodland center is quite large, having over 100 loading bays. From that location it provisions about 250 stores with a staff of about 66 drivers. They drive about 35 tractors hauling the approximately 200 trailers assigned to that location. The terminal manager during the transactions involved here was Bob Swor. He was the drivers' immediate supervisor and was in charge of all safety matters in Woodland. He reported directly to Jim Foster, Respondent's fleet manager for trucking operations, and its safety manager, Craig Southard, both of whom are officed in Wilsonville. They in turn report to the vice president in charge of operations, Shannon McCord, who is also located at the Wilsonville headquarters.

During the winter of 1990-1991, the Union engaged in a drive at the Woodland facility seeking to organize all the drivers. That effort resulted in an NLRB election, Case 20-RC-11674, on January 17, 1991. The Union was unsuccessful in persuading a majority of employees to vote for representation and a certification of results was issued shortly

¹ All dates are 1991 unless otherwise noted.

² In his brief the General Counsel renews a previously denied motion to amend the complaint in Case 20-CA-24380 in certain respects. I see no reason to reconsider the matter for it is not reasonably encompassed by that charge as filed by McDonald.

thereafter. McDonald testified that he had supported the Union in that drive by providing it with certain computer services and writing letters to his fellow drivers utilizing his computer skills.

Although the January election had been unsuccessful, the union activities of some of the employees did not cease altogether.

B. McDonald's Union Activities

In September, aware that the 1-year certification bar was coming to an end, McDonald and another driver returned to the union office in Sacramento where they spoke to Secretary-Treasurer Cliff Webb and Business Agent Ken Christopher. They obtained additional authorization cards and set up a game plan for organizing.

Among other things, the union officials gave McDonald a copy of the election eligibility list which the Company had provided for use in the January 1991 election. The list contained both the names and mailing addresses of the drivers employed at that time.

On September 23 McDonald, using his computer, sent a letter to each driver and hostler in Woodland. He says he mailed them at his own expense. Included with the letter were union authorization cards. The letter, itself reads, in pertinent part:

In January of this year, you voted in a National Labor Relations Board sanctioned election which would have authorized Teamsters Local #150 to represent the drivers of PLXpress.

A majority of the drivers fell victim to the same old line management has given the California drivers for over four years. "We're going to bring you up to parity with Wilsonville drivers" is the redundant statement management always has on their lips.

I hope everyone is fully aware we were taken for suckers. The only thing we got was a 3.704% raise for hourly work, a 2.941% raise for mileage runs, and a seven day work week.

It is time to make a statement and make a united stand. We need to let management know that we have had enough of their empty promises and selective enforcement of company and D.O.T. [Department of Transportation] regulations.

Cliff Webb (newly elected secretary-treasurer of Local #150) told me, during a meeting I had with him, the Teamsters would take a greater stand to help PLXpress drivers organize. He felt a major mistake was made during the last organization attempt.

Please fill out the enclosed card and drop it in the mail today.

One of the drivers, Joe Theriot, immediately gave a copy of his letter to Swor who telefaxed it to Wilsonville headquarters. During this timeframe, McDonald had become a hostler. The hostling job is available to selected drivers on a more or less permanent basis. Instead of driving over the road, the hostler drives a light-weight tractor called a "goat" in and around the Woodland distribution facility, spotting trailers at loading bays and storage areas. Normally there are four employees who perform this task on a round-the-clock basis.

C. The Company's Response

On September 25, 2 days after McDonald mailed the letter, Terminal Manager Swor pulled him from his hostling duties to speak by telephone to Fleet Manager Foster in Wilsonville. Foster asked McDonald about the letter. According to McDonald, Foster was "upset and angry" during the conversation, particularly with that portion of McDonald's letter which accused Respondent of "selective enforcement of company and DOT regulations." He ended the conversation telling McDonald that he would discuss the matter with McCord to decide what punishment McDonald should receive for sending this letter to the drivers.

On October 1, Foster came to Woodland and delivered a letter of suspension to McDonald. That letter reads:

On September 23rd, you wrote a letter to some of the drivers which accused PLXpress of selective enforcement of Company regulations, making empty promises and making "suckers" of the drivers.

We have had conversations about similar accusations with you before.

Your unfounded, malicious accusations distort the truth and unfairly badmouth the company.

You are hereby being suspended for one (1) week effective Wednesday October 2, 1991 through Tuesday, October 8, 1991. . . .

McDonald acknowledged receipt of the notice by his signature on that date.

However, the suspension did not deter McDonald from continuing his organizing activities. During the suspension he prepared a second letter which he mailed to all the drivers on about October 7. That letter reads as follows:

Two weeks ago you should have received a letter and union pledge card from me. To those of you who have returned the cards by mail, kudos to you. To you who have not, please keep an open mind and continue to read this letter.

By now I'm sure you are aware our brother drivers in Wilsonville have ratified their contract.³ If and when you send your card in, you will receive a copy of that contract. Read it. Take note how our California guidelines have been cherry picked from this contract. We do the same work as the Wilsonville drivers [but] are not being treated the same.

Sending the card back to Local #150 will not mean a yes vote for the Union at this time. It will mean that you have an open mind and are willing to listen to the alternatives. You will never know these alternatives if you don't keep an open mind. The company will *never* know if you have returned your card to the Union.

October 1, 1991 I was suspended, not terminated as some rumors indicate, for one week. My card is on file with the union and I'm protected from such harassment by federal law.

If you have any question call me at [telephone number].

³ The Wilsonville drivers are represented by a Teamsters Local in that area.

McDonald, as he had with the September 23 letter, enclosed union authorization cards with the October 7 missive.

He also testified that during his off-duty hours he engaged in a certain amount of organizing activity, speaking to fellow drivers about the pension plan, the health plan, and other working conditions which the Union would seek in the event it was selected. Swor obtained a copy of the second letter and also faxed it to Wilsonville as he had the first.

For the next month or so, Respondent appears to have given McDonald some extra scrutiny. One example is that sometime around Thanksgiving, according to Swor, a security department report was made accusing McDonald of having taken candy from the lunchroom, contrary to the Company's honesty policy. Swor agrees the candy in question was unsalable, its shelf life having expired. It had apparently been placed in the lunchroom as a holiday season good will gesture by the Company for consumption by its drivers and other employees stationed at the center. Swor immediately sent that report to his superiors in Wilsonville. Curiously, the incident was not cited as a reason for his discharge after the accident on December 4, probably because it did not breach the honesty policy. However, Respondent raised it at the hearing before me as an additional reason contributing to the decision to fire McDonald. Whatever it is, there can be little doubt Respondent was paying special attention to McDonald.⁴

On December 4, McDonald was working as a hostler. At about 10 a.m., while driving the yard goat and moving a trailer from a warehouse bay to a storage space, he turned too quickly to his left and the front portion of the trailer slipped over a 3-1/2 foot concrete street lamp base and knocked the lamp pole down.

After McDonald made out his accident report, Swor placed him on an investigative suspension pending the results of further investigation of the accident, including a drug test.⁵

By letter dated December 9, Swor terminated McDonald saying:

On 12/4/91 you were involved in another preventable accident. On 8/22/89 you were involved in a similar accident and were warned at that time if *another* accident of this nature occurred, it could result in termination.

Based upon our investigation of this accident, the safety committees finding, and your history of carelessness, we have decided to terminate your employment

from the company effective 12/9/91. [Emphasis in original.]

Swor testified that he was not really the person who made the decision to terminate McDonald. He said that the decision itself was made by Wilsonville executives, although he agrees that he did discuss the matter with them. None of those executives testified in the preceding before me.

As noted, the termination letter, refers to a 1989 accident, asserting it was "similar" and that the two, when taken together, demonstrate a "history of carelessness." I think it is fair to say that the earlier accident, which occurred at a Payless parking lot in San Jose, California, does have some superficial similarities. In that incident, McDonald was trying to maneuver a tractor trailer through a parking lot which had been disrupted by extensive construction. In the course of avoiding the construction debris and equipment, his trailer struck a light pole. Respondent's records show it gave McDonald a warning and a retroactive 2-day suspension, apparently covering the days off he was given while they investigated the matter.

What is unclear about this kind of incident, as well as about numerous other accidents which have befallen drivers stationed at Woodland, is that there is no written company policy regarding the appropriate discipline to be levied on the drivers for preventable accidents. Swor says the reason there is no written policy is because each accident is different. He gave a great deal of testimony trying to explain the predominant factors by which he judges the relative culpability of a driver in an incident. He asserts that if a driver has an accident caused by an "error of judgment," he treats such drivers more leniently. On the other hand, if the accident is due to a driver shown to be "careless," then the discipline is likely to be more severe. Frankly, a review of McDonald's first accident, using Swor's own test, suggests that an error of judgment, not carelessness, is the more likely cause of that minor mishap. Clearly, in that incident, there is room for disagreement over which category was appropriate.

In either event, the level of discipline is uncertain at best. Sometimes individuals receive no discipline, at other times they receive written admonishments and at other times written warnings or even suspensions. Discharges are quite rare. Moreover, there does not seem to be any logical progression in how any particular discipline is chosen. Individuals have received warnings or suspensions on occasion and then when involved in a succeeding preventable accident, have often escaped more serious consequences despite the "history" which they have developed.

A review of the accident records and the discipline connected to them took up more than a day and a half of testimony and very little can be said about these accidents except that the policy which the Company follows is no policy at all. I note that the record demonstrates that Respondent's predecessors, Leaseway and Electrans did have written accident policies and did enforce them. At no time has Respondent ever advised the drivers that those policies had ever been dropped in favor of Swor's "poor judgment" versus "carelessness" test.

Curiously, higher risk conduct than McDonald's parking lot maneuvering, such as excessive speed, excessive number of highway citations, and the like are not tracked at all. Had

⁴No party asked McDonald any questions about the candy matter. As it now stands in the record, the incident is one of unsupported accusation only for there is no tenable evidence whatsoever. The report is hearsay and no person having firsthand knowledge has testified about it.

⁵McDonald was not found to have been under the influence of any drug. He did tell the test taker that he was under medication, but did not cite it as an excuse for the accident. Respondent now argues that McDonald never told any management official about the medication prior to driving that morning, expanding its significance to either being a cause of the accident or at least a violation of DOT regulations. McDonald replies he had previously advised the dispatcher he was taking the medication. The dispatcher was not called to refute McDonald's factual testimony. I credit McDonald on each point, particularly noting there is no contrary evidence. There is no proof that he violated any company policy or DOT regulation in taking the medicine.

those drivers become involved in accidents at the speeds at which they were traveling, the speed alone, a so-called judgment matter, would have caused unacceptable damage. McDonald, on the other hand, has never had a highway accident nor has he ever been cited for excessive speed. Indeed, in 1990, he received the standard safety award given drivers who had no accident. It should be noted here that he did not get one in 1988 because of a broken mirror, an incident which by 1991 would have been regarded as so minor it would not have been counted as an infraction serious enough to have denied him the award. Moreover, in a May 1991 "ride-a-long" report, Swor found McDonald to be a "very careful & safe driver. One of the smoothest drivers I have ridden with. Should never get a speeding ticket."

The General Counsel has attached to his brief a summary of accident records, all of which are supported by exhibits in the record. The summary describes the accident and traffic citation records of some 30 drivers. Only two of these were discharged, Roland Haymore and James Wilson. Wilson was a probationary employee who had two collisions with fixed objects within 3-1/2 months in 1989, together dropping a trailer which he had improperly hooked up, considered to be an accident. He was not fired until after the third incident. He is also an example of an individual whose discipline was not progressive. After the first he was suspended for 2 days, together with a warning;⁶ after the second he received a corrective interview letter without a warning. Finally he was discharged.

Haymore had five incidents, one of which was regarded as nonpreventable and another in which he damaged his truck while driving continuously with a flat tire, a clear abuse of the equipment. The others were hitting a wall at a store loading dock and two collisions on the road. For these accidents he received two corrective interview reports, a warning letter and, finally, discharge. All of these incidents occurred between July 1989 and the end of September 1990. Suspension as a means of discipline or progressive discipline was not utilized.

Yet, suspension is a common disciplinary measure used by Respondent. There are numerous drivers who received a suspension for accidents of one sort or another, but were not discharged. The summary shows at least 10. One of those was a 5-day suspension given hostler Vaughn after he knocked over a light pole in the yard with the goat in June 1990. McDonald testified that after his December 4 accident with the yard goat he expected he, too, would suffer a suspension because he knew his accident record fell in the less-than-discharge category. He was well aware that under normal company practice suspension was the most probable discipline to be imposed. Accordingly, the discharge, to him, was a total surprise.

⁶Most of the forms used for discipline are called "corrective interview report." All contain boilerplate language advising the employee that if he does not correct the situation, he will be subject to further discipline or termination. These reports are usually signed by the employee. They are not regarded as warnings unless the word "warning" is stamped on it. Whether and when that stamp is placed on the form is problematical.

IV. ANALYSIS AND CONCLUSIONS

Although Respondent argues that its treatment of McDonald on October 1 was lawful, it virtually concedes most of McDonald's letter was fully protected by Section 7 of the Act. I certainly have no difficulty in concluding the letter was fully protected. It was written as the first salvo in a union organizing campaign which was then beginning. In large part, it was standard organizing fare. It made contentions that Respondent was not treating its employees as it should, that it was not living up to promises it had made, and that it was time for the employees to "let management know we have had enough of their empty promises"

Indeed, Respondent's only stated objection to McDonald's language was his reference to the alleged "selective enforcement of company regulations," omitting any reference to McDonald's claim that it also selectively enforced DOT regulations. Respondent now contends it is very sensitive to allegations that it does not properly enforce the DOT rules. Swor says McDonald and the Company had been through such allegations before, that they had been fully investigated, and that Respondent had been found not to be guilty of such conduct. Whether that is objectively true or not, McDonald did not, and does not now, agree. Even Respondent does not contend that the findings of "innocence" were made by anybody other than an investigator who did not find sufficient proof. It is not even clear who conducted those investigations, Respondent itself, a Government agency or an outside private investigator. If the DOT rules were a concern, why did Respondent not include that reason in its letter?

In any event such contentions are standard grist for the debate mill which labor and management grind during an organizing campaign. It is quite common for a labor union to assert that employees' working conditions are being affected by "selective enforcement" of various things, company rules, state or Federal regulations, and supervisory matters. Unions generally seek to have rules applied to their members in a uniform fashion and a contention that the rules are not being applied uniformly is a legitimate campaign appeal.

This Respondent, however, did not recognize it as such and, thin-skinned, took a reprisal against McDonald by suspending him, using as a justification that the language was "bad mouthing" the Company. I agree; McDonald was bad-mouthing the Company. Within certain parameters, the Act permits him to do so; indeed, it protects him when he does so in an organizing context, as long as the remarks are not disparaging and disloyal. See *Cincinnati Suburban Press*, 289 NLRB 966 (1988); cf. *Community Hospital of Roanoke Valley*, 220 NLRB 217 (1975), *enfd.* 538 F.2d 607 (4th Cir. 1976). McDonald's remarks nowhere approach that level. Therefore, Respondent's discipline and suspension of him for writing the protected letter violated Section 8(a)(1) and (3) as alleged in the first complaint.

The harder question, though not much harder, is whether Respondent used the December 4 yard accident as an excuse to rid itself of a known union organizer or whether its decision to discharge McDonald was based on nondiscriminatory factors. I think it is clear that under the *Wright Line*⁷ and

⁷251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st. Cir. 1981), *cert. denied* 455 U.S. 989 (1982).

*NLRB v. Transportation Management Corp.*⁸ doctrine the General Counsel has made out a prima facie case that Respondent's December 9 discharge of McDonald was unlawful. All the elements of a 8(a)(3) and (1) violation are present. McDonald was a union organizer and Respondent had instantly become aware of it. Furthermore, Respondent harbors animus against individuals who engage in organizing activity. Its quick suspension of McDonald for writing his first letter and for distributing authorization cards is ample proof of that fact. In a sense, the December 9 discharge can be seen as a continuation of the unlawful suspension given him in October. It occurred within 2 months of his having been punished for protected conduct. Therefore, the element of timing is also present. There is no doubt the General Counsel has presented a strong prima facie case.

Under the doctrine of those cases, after the prima facie case has been established, the burden shifts to Respondent to demonstrate that it would have discharged McDonald even had he not been a union organizer. I conclude that Respondent has failed to meet its burden here.

In scrutinizing Respondent's defense, several things are apparent. First, the fact that Respondent has no written policy regarding how to deal with employees who have accidents allows it a great deal of subjective flexibility. It need justify none of its decisions against a written policy. Therefore, there is no way for a reviewer to measure Respondent's response to an accident against any nondiscriminatory policy. That means, in essence, that the policy becomes whatever Respondent's decisionmaker wants it to be in any given circumstance.

Second, assuming that one accepts Swor's claim that he evaluates accidents based on his determination of whether it was due to an error in judgment or carelessness, neither of those terms is very helpful. Clearly judgment errors readily become carelessness. A simple example is the one of excessive speed. If a driver uses bad judgment and drives at a speed in excess of what is prudent and safe for the circumstances, and an accident ensues, that decision might well be regarded by some other evaluator as either carelessness or recklessness, even if Swor thought it only bad judgment. Swor's use of this terminology is simply not helpful. Even he acknowledges that there are times when the two concepts merge.

Third, the very lack of guidance, either because of no written policy or because Swor has defined his concepts in a way peculiar to him, has resulted in disciplinary procedures which are most inconsistent. Individuals who have been involved in accidents or misconduct far in excess of that committed by McDonald have escaped discipline altogether or have suffered lesser or slower discipline. Indeed, neither of McDonald's accidents involved a large monetary loss. Yet Swor contends that monetary loss is not a significant factor in determining whether a driver should be subjected to discipline. I agree that dollar figures standing alone do not tell the entire story, but I find it inconceivable that the amount of the loss is given no weight whatsoever in evaluating a preventable accident. That is particularly so when Swor says an error in judgment can excuse a driver from discipline. Frankly, I can think of numerous circumstances where a driver's error in judgment, though small, and therefore easily avoided, could

result in a large monetary loss. That does not even take into account the question of whether a small judgment error accident may have resulted in injury or loss of life.

Curiously, despite Swor's testimony that the Company has no accident policy, Respondent now argues that McDonald's conduct constituted a breach of another company policy contained in a booklet called "Payless Pride." That booklet clearly applies to Payless's retail store employees, not drivers employed by its transportation subsidiary. The booklet does contain a rule prohibiting "associates," i.e., sales personnel, from engaging in "willful, deliberate or reckless conduct." Yet Swor admitted he does not use the booklet as a policy for drivers nor did he ever tell McDonald that it was being used at the time of the discharge. The argument today, made by counsel, seems off the mark.

Furthermore, counsel's resort to the candy incident as a partial justification for the discharge, though Swor never included it in the discharge letter, does not assist Respondent's corporate credibility here. It may properly be regarded as make weight and therefore evidence of unlawful purpose. Finally, Swor testified that the decision to discharge McDonald was made by Wilsonville executives, Southard, Foster, and McCord after a review of McDonald's entire personnel file. None of those individuals testified on Respondent's behalf, and Swor asserts that he himself did not actually make the decision to discharge McDonald. If that is so, Respondent has not presented any evidence by any decisionmaker regarding the basis for the decision. Is that because the decisionmakers would have had to testify that a significant factor contributing to the decision to discharge McDonald was his having engaged in union organizing activity? After all, his entire file included the recent suspension for having written a protected letter seeking to organize the drivers.

Frankly, I see nothing in Respondent's policies or practices which would lead to the conclusion that Respondent would have discharged McDonald in the absence of his protected activity. Specifically, it seems to me that its more mild responses to the transgressions of other drivers who had committed worse acts than McDonald, but who were not discharged, leads to the opposite conclusion. The only difference between McDonald and the others is that he was engaging in union organizing activity. Had he not been so engaged, it seems most probable that the discipline to be levied on him would have been less severe, perhaps a short suspension, or perhaps only a warning. Moreover, the two employees who were discharged were allowed at least one more accident than was McDonald. I find, therefore, that Respondent has failed to rebut the General Counsel's prima facie case and I conclude that Respondent discharged McDonald on December 9, 1991, because he was a union organizer and not because of the rather minor accident he had on December 4 or the "history" it supposedly evidenced. Accordingly, I find that Respondent violated Section 8(a)(3) and (1) of the Act as alleged in the second complaint.

V. THE REMEDY

Having found Respondent to have engaged in certain violations of Section 8(a)(3) and (1) of the Act, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative action to effectuate the policies of the Act. The affirmative action will include an order requiring Respondent to make Jay McDonald whole for

⁸ 462 U.S. 393 (1983).

losses resulting from his suspension from work without pay from October 2 through October 8, 1991, plus interest as set forth by the Board in its decision in *Ogle Protection Service*, 183 NLRB 682 (1970). It shall also include an order requiring Respondent to immediately offer McDonald reinstatement to his former job or, if it is not available, to a substantially equivalent position, and to make him whole for any loss of earnings and other benefits, computed on quarterly basis from the date of his discharge to the date of a proper offer of reinstatement, less interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). Finally, it shall also include an order requiring Respondent to expunge from its records any reference to its suspension and subsequent discharge of McDonald, requiring it not to use either of them against him in any way. See *Sterling Sugars*, 261 NLRB 472 (1982).

On the foregoing findings of fact and on the entire record in this case I make the following

CONCLUSIONS OF LAW

1. Respondent is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. On October 1, 1991, Respondent suspended its employee Jay McDonald because he had engaged in the protected activity of serving as a union organizer and because he had written a letter to Respondent's employees seeking to organize those individuals on behalf of the Union, and thereby violated Section 8(a)(3) and (1) of the Act.

4. On December 9, 1991, Respondent discharged its employee Jay McDonald because of his activities for and on behalf of Chauffeurs, Teamsters and Helpers Union Local 150, International Brotherhood of Teamsters, AFL-CIO and thereby breached Section 8(a)(3) and (1) of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁹

ORDER

The Respondent, PLXpress, a wholly owned subsidiary of Payless Drug Stores NW, Inc., Woodland, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Suspending, discharging, or otherwise affecting the hire and tenure of employees because they choose to engage in activity protected by Section 7 of the Act, such as serving as union organizer.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Jay McDonald immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority

or any other rights or privileges previously enjoyed, and make him whole for any loss of earnings together with interest or other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of this decision.

(b) Remove from its files any reference to the unlawful suspension and unlawful discharge of Jay McDonald and notify him in writing that this has been done and that neither the suspension nor the discharge will be used against him in any way.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its Woodland, California distribution center copies of the attached notice marked "Appendix."¹⁰ Copies of the notice, on forms provided by the Regional Director for Region 20, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

¹⁰ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT suspend or discharge employees or otherwise affect their hire and tenure for engaging in activity protected by Section 7 of the Act, such as serving as a union organizer for Chauffeurs, Teamsters and Helpers Union Local 150, International Brotherhood of Teamsters, AFL-CIO or any other labor union.

¹⁸ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL offer Jay McDonald immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges he previously enjoyed, and WE WILL make him whole for any loss of earnings together with interest, or other benefits suffered as a result of our discrimination against him.

WE WILL remove from our files any reference to the unlawful suspension and unlawful discharge of Jay McDonald and notify him in writing that this has been done and that neither the suspension nor the discharge will be used against him in any way.

PLXPRESS, A WHOLLY OWNED SUBSIDIARY OF
PAYLESS DRUG STORES NW, INC.